

BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

ABRAHAM RODRIGUEZ

Claimant

v.

FACTORY DIRECT COPPER AND GRANITE

Respondent

and

UNKNOWN

Insurance Carrier

Docket No. 1,075,730

ORDER

Respondent and its insurance carrier (respondent) request review of the January 8, 2016, preliminary hearing Order entered by Administrative Law Judge (ALJ) Thomas Klein. Claimant appears by counsel, Mitchell W. Rice of Hutchinson, Kansas. Respondent appears by counsel, Scott B. Poor of Wichita, Kansas.

ISSUES

The ALJ found respondent maintained sufficient control over claimant's work to make claimant an employee within the meaning of the Workers Compensation Act (Act). The ALJ awarded claimant temporary total disability compensation (TTD) based on an average weekly wage of \$600, from the date of accident, November 2, 2015, until claimant reaches maximum medical improvement (MMI). The ALJ authorized Dr. Burr as claimant's treating physician for treatment, testing and referrals.

Respondent contends no employee/employer relationship exists between respondent and claimant and respondent had no right to control claimant's activities. Respondent argues it is not a proper party to be named in the proceedings. Respondent further argues claimant is an employee or independent contractor to Edgar Escobar, who is not named as a party to the claim. Respondent argues claimant was hired, supervised and worked ten years for Mr. Escobar. Respondent identifies Mr. Escobar as an independent contractor for respondent.

Respondent requests the Board find claimant was an independent contractor or an employee of Mr. Escobar, deny him coverage under the Workers Compensation Act and remand this matter to the ALJ to allow respondent the opportunity to add Mr. Escobar as an additional respondent.

Claimant has not provided a brief for the Board's consideration. At the hearing, claimant's counsel argued claimant worked at respondent's place of business, used respondent's equipment and materials to perform his job and was paid directly by respondent. Claimant contends respondent had sufficient control in its relationship with claimant to find the employer/employee relationship existed.

Issues on appeal are:

1. Was claimant an employee of respondent at the time of claimant's accidental injury?
2. If claimant is not an employee of respondent, is he an employee of Edgar Escobar?
3. If claimant is an employee of Edgar Escobar, is Edgar Escobar an independent contractor of and/or a subcontractor of respondent?
4. If claimant is an employee of Edgar Escobar, and Edgar Escobar is an independent contractor/or a subcontractor of respondent, does K.S.A. 44-503 apply?

FINDINGS OF FACT

Before working for respondent, claimant and Edgar Escobar worked for Quality Granite cutting, polishing and installing stone. Mr. Escobar told claimant he needed a coworker to work for respondent with him. Mr. Escobar and claimant performed work for respondent for around one year.

Claimant testified he and Mr. Escobar began working at 8:00 in the morning. Scott Bishop, respondent's manager, told claimant and Mr. Escobar what to do. Mr. Bishop gave them a paper in the morning showing their work location. Claimant and Mr. Escobar measured the cabinets at the residence work site, went to the shop to cut and polish the stone and then returned to the work site to install the stone.

On November 2, claimant was injured when they were moving a stone from a table to put it on a dolly. Claimant testified he moved the stone down one side of the table and the table landed on top of his foot. Mr. Escobar lifted the table and when claimant pulled his foot out, Mr. Escobar let go of the table which hit claimant. Claimant's leg was broken and his ankle was swollen. Mr. Bishop owned the stone, the dolly they used to move the stone and the table that fell on claimant's leg.

Claimant testified Mr. Escobar took him to the hospital and showed them Mr. Bishop's business card. Claimant did not get treatment for a week because respondent refused to pay.

Claimant testified Mr. Bishop did not communicate with him much because Mr. Bishop did not speak Spanish and claimant does not speak English. Mr. Escobar would talk to Mr. Bishop about when to work and Mr. Escobar would tell claimant.

Claimant testified respondent had another team of three people, for a total of five people working for respondent. Respondent paid claimant \$120 per day and he was paid at the end of each week. Mr. Bishop's name was on the paychecks they received. Claimant was handed his check by either Mr. Bishop or Mr. Escobar.

Claimant and Mr. Escobar used Mr. Bishop's truck to drive to the houses to install the granite. After Mr. Bishop's truck broke down, Mr. Escobar bought a pickup truck with a long bed that they used.

Claimant testified Mr. Bishop owned the warehouse shop where they cut the stones. Claimant used a saw, a blade and sandpaper for polishing. Mr. Escobar spoke to Mr. Bishop to bring the materials. Mr. Bishop owned both the forklift they used to move the material and the saw they used to cut the stones.

Respondent is a vendor of granite marble, quartz and stainless steel utilized for kitchen and bathroom countertops, cabinetry and fixtures, serving residential and commercial markets. Respondent works with numerous independent contractors, homebuilders, home remodeling firms, interior designers, decorators and architects in the Wichita area.

Scott Bishop, respondent's manager, provided a notarized statement. The affidavit of Mr. Bishop¹ claims Mr. Escobar is one of the independent contractors who work with respondent. As an independent contractor, Mr. Escobar provides installation services on a limited, flat-fee, at-risk, competitive bid and contractual basis, and is not an employee of respondent. Mr. Escobar worked with respondent on numerous projects over the past two years. Respondent's relationship with Mr. Escobar is non-exclusive and respondent works with other independent contractors.

Mr. Bishop alleges Mr. Escobar has sole discretion in staffing, scheduling, supervising and training for his installation contracts. Mr. Escobar provides equipment and tools.

Mr. Bishop has no contract with claimant and did not witness the incident causing claimant's injuries. Claimant was an associate of Mr. Escobar. Mr. Bishop does not know the status of employment or the conditions of the relationship between claimant and Mr. Escobar. Mr. Bishop has no knowledge of Mr. Escobar's workers compensation coverage.

¹ P.H. Trans., Resp. Ex. 1.

PRINCIPLES OF LAW AND ANALYSIS

K.S.A. 44-501b states:

(b) If in any employment to which the workers compensation act applies, an employee suffers personal injury by accident, repetitive trauma or occupational disease arising out of an in the course of employment, the employer shall be liable to pay compensation to the employee in accordance with and subject to the provisions of the workers compensation act.

(c) The burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.

There is no absolute rule for determining whether an individual is an independent contractor or an employee.² The relationship of the parties depends upon all the facts, and the label that they choose to employ is only one of those facts. The terminology used by the parties is not binding when determining whether an individual is an employee or an independent contractor.³

The primary test used by the courts in determining whether the employer-employee relationship exists is whether the employer has the right of control and supervision over the work of the alleged employee, and the right to direct the manner in which the work is to be performed, as well as the result which is to be accomplished. It is not the actual interference or exercise of control by the employer, but the existence of the right or authority to interfere or control which renders one a servant, rather than an independent contractor.⁴

In addition to the right to control and the right to discharge the worker, other commonly recognized indicators of the independent contractor relationship are:

- (1) The existence of a contract to perform a piece of work at a fixed price.
- (2) The independent nature of the worker's business or distinct calling.

² *Wallis v. Secretary of Kans. Dept. of Human Resources*, 236 Kan. 97, 102, 689 P.2d 787 (1984).

³ *Knoble v. National Carriers, Inc.*, 212 Kan. 331, 510 P.2d 1274 (1973).

⁴ *Wallis*, 236 Kan. at 102-03; citing *Jones v. City of Dodge City*, 194 Kan. 777, 780, 402 P.2d 108 (1965).

- (3) The employment of assistants and the right to supervise their activities.
- (4) The worker's obligation to furnish tools, supplies and materials.
- (5) The worker's right to control the progress of the work.
- (6) The length of time the employee is employed.
- (7) Whether the worker is paid by time or by job.
- (8) Whether the work is part of the regular business of the employer.⁵

In *Hill*⁶, the Court of Appeals stated the court primarily applied the right to control test, but generally considered several additional factors, including:

- “(1) [t]he existence of the right of the employer to require compliance with instructions;
- “(2) the extent of any training provided by the employer;
- “(3) the degree of integration of the worker's services into the business of the employer;
- “(4) the requirement that the services be provided personally by the worker;
- “(5) the existence of hiring, supervision, and paying of assistants by the workers;
- “(6) the existence of a continuing relationship between the worker and the employer;
- “(7) the degree of establishment of set work hours;
- “(8) the requirement of full-time work;
- “(9) the degree of performance of work on the employer's premises;
- “(10) the degree to which the employer sets the order and sequence of work;
- “(11) the necessity of oral or written reports;
- “(12) whether payment is by the hour, day or job;

⁵ *McCubbin v. Walker*, 256 Kan. 276, 886 P.2d 790 (1994).

⁶ *Hill v. Kansas Dept. of Labor*, 42 Kan. App. 2d 215, 222-23, 210 P.3d 647 (2009), *aff'd in part, rev'd in part*, 292 Kan. 17, 248 P.3d 1287 (2011).

“(13) the extent to which the employer pays business or travel expenses of the worker;

“(14) the degree to which the employer furnishes tools, equipment, and material;

“(15) the incurrence of significant investment by the worker;

“(16) the ability of the worker to incur a profit or loss;

“(17) whether the worker can work for more than one firm at a time;

“(18) whether the services of the worker are made available to the general public;

“(19) whether the employer has the right to discharge the worker; and

“(20) whether the employer has the right to terminate the worker.”⁷

The ALJ determined respondent maintained sufficient control over claimant's work to make claimant an employee within the meaning of the Act. This Board Member agrees. Claimant provided none of the tools to perform this job. Claimant was told when and where to work, controlled none of the progress of the work and was paid a daily amount, with payment each week coming from respondent. The determination that claimant is an employee of respondent is affirmed.

Respondent contends, in the alternative, that claimant is an employee of Mr. Escobar and Mr. Escobar is an independent contractor of respondent.

K.S.A. 44-503 states:

(a) Where any person (in this section referred to as principal) undertakes to execute any work which is a part of the principal's trade or business or which the principal has contracted to perform and contracts with any other person (in this section referred to as the contractor) for the execution by or under the contractor of the whole or any part of the work undertaken by the principal, the principal shall be liable to pay to any worker employed in the execution of the work any compensation under the workers compensation act which the principal would have been liable to pay if that worker had been immediately employed by the principal; and where compensation is claimed from or proceedings are taken against the principal, then in the application of the workers compensation act, references to the principal shall be substituted for references to the employer, except that the amount of compensation shall be calculated with reference to the earnings of the worker under the employer by whom the worker is immediately employed. For the purposes

⁷ *Id.* at 222-223.

of this subsection, a worker shall not include an individual who is a self-employed subcontractor.

(b) Where the principal is liable to pay compensation under this section, the principal shall be entitled to indemnity from any person who would have been liable to pay compensation to the worker independently of this section, and shall have a cause of action under the workers compensation act for indemnification.

Even if respondent's contention is correct, respondent remains responsible for both the TTD and medical expenses associated with this accident. Respondent would have been liable to pay compensation for claimant's injuries if claimant had been immediately employed by respondent. The installation of the counter tops is clearly a part of respondent's trade or business.

The Kansas Supreme Court, in *Woods*⁸ identified two definite tests by which to determine whether a principal is liable for workers compensation benefits.

(1) Is the work being performed by the independent contractor and the injured employee necessarily inherent and an integral part of the principal's trade or business?

(2) Is the work being performed by the independent contractor and the injured employee such as would ordinarily have been done by the employees of the principal?

In this instance, both tests are satisfied sufficient to award preliminary benefits against respondent and in favor of claimant.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.⁹ Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2014 Supp. 44-551(I)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

CONCLUSIONS

After reviewing the record compiled to date, the undersigned Board Member concludes the preliminary hearing Order should be affirmed. Claimant has satisfied his burden of proving entitlement to preliminary benefits based upon either an actual employer/employee relationship or that of a statutory employee under K.S.A. 44-503(a).

⁸ *Woods v Cessna Aircraft Co.*, 220 Kan 479, Syl. 2, 553 P.2d 900 (1976).

⁹ K.S.A. 44-534a.

DECISION

WHEREFORE, it is the finding, decision and order of the undersigned Board Member that the Order of Administrative Law Judge Thomas Klein dated January 8, 2016, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of March, 2016.

HONORABLE GARY M. KORTE
BOARD MEMBER

c: Mitchell W. Rice, Attorney for Claimant
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Honorable Thomas Klein, Administrative Law Judge